MICHIGAN SUPREME COURT

PUBLIC HEARING
SEPTEMBER 15, 2010

CHIEF JUSTICE KELLY: Good morning ladies and gentlemen. Welcome to the Court's first administrative hearing of our new term. I'm delighted to tell you that we are not constituted as we were before. We have a new Justice with us and that's Justice Alton Davis who is sitting here to my left. Justice Davis comes to our Court with many years of experience as a jurist, both at the trial court level and at the appellate level and on the Court of Appeals. He enjoys an excellent reputation and we're pleased - very pleased to have him with us.

JUSTICE DAVIS: Thank you.

CHIEF JUSTICE KELLY: The first item on our agenda today is public comment - public hearing on items that have been distributed and commented on in writing by various people at this point. So we will begin by hearing comments on first Item #1 which proposes establishing a procedure for court clerks to screen documents submitted for filing with the court. And we have - I know Mr. - or Judge Richards is here, is that right? Judge - excuse me - Judge would you like to come forward?

ITEM 1: 2005-32

JUDGE RICHARDS: Good morning and may it please the Court. It's good to be back before you again on this rule that seems to go on forever. I'm not sure whether it's going - close to setting some sort of record. When I talked to Anne Boomer yesterday and she asked me to get in our new proposal, I told her that I was busy trying to settle my oldest civil case down in the 46th District Court, and I did manage to settle it yesterday so maybe this is going to be a good week for progress on this old issue as well before the Court. The Court now has before it two competing proposals relating to clerical screening authority. The Supreme Court administrative - State Court Administrative Office workgroup proposal - that proposal arises from a workgroup consisting of mostly district court administrators and our 46th District Court proposal. I

prefer - our court prefers our own proposal for reasons of simplicity, but I do want to say that the workgroup proposal has many meritorious ideas in it. We, of course, support the idea of judicial review of clerical decisions because that's the way the trial courts ought to work especially district courts. I think that clerical decisions all ought to be preliminary in nature and reviewable by - by a judge. Other than that I'm open to questions from the Court about either proposal.

CHIEF JUSTICE KELLY: Could you describe briefly how the new proposal differs from your past?

JUDGE RICHARDS: Yes, I'd be happy to. Our court has added one sentence in particular to an earlier version of the proposal. And that is simply that when a clerk receives a paper for filing the clerk must do one of two things. Either process it - accept it and process it, or return it as noncomforming. The purpose of that provision is to prevent what we have found out a few district courts in our state do which we find unacceptable and that is to simply take a flawed paper in and stick it in the file and do nothing. It seems to me that surely we can agree that that is an unacceptable practice and therefore we've offered language that would require that clerks do one or the other - either return it as noncomforming with a notice saying here's what we find wrong with this and here are your options for going forward or accept it for filing and process it. Other than that our proposal remains as submitted before. It contains a complete judicial review provision in it which means that any time a litigant disagrees with a clerk's decision to return a nonconforming document the litigant can ask for a simple judicial review. A phone call to the clerk is enough to trigger that judicial review function. We've tried to make it as simple as possible - no motion, no hearing, no filing fee of any kind. And in that sense, our rule is patterned after a rule that's already on the books - 2.625 on taxation of costs. And in that rule a clerk makes the decision on how to tax costs and the litigant can get judicial review on motion.

JUSTICE YOUNG: Judge?

JUDGE RICHARDS: Yes.

JUSTICE YOUNG: I read with interest your report.

JUDGE RICHARDS: The pilot project report, yes.

JUSTICE YOUNG: Yes. The project that was approved by the Court was limited to garnishments, was it not?

JUDGE RICHARDS: To consumer debt cases, correct.

JUSTICE YOUNG: Right. But I read with interest that notwithstanding the scope of the project, the court expanded the scope to include all civil case filings.

JUDGE RICHARDS: All civil case filings, that's right.

JUSTICE YOUNG: That wasn't authorized.

JUDGE RICHARDS: True. But we wrote the Court a letter -

JUSTICE YOUNG: Just a moment.

JUDGE RICHARDS: Yes.

JUSTICE YOUNG: I'm concerned because this case - this project all began with a published case, *In re Credit Acceptance Corp*, which rejected the principle upon which this pilot project was premised that clerks had the authority to reject pleadings. Notwithstanding that your court considered to treat that - that decision as though it didn't apply to your court. You then petitioned for a pilot project -

JUDGE RICHARDS: That's not true.

JUSTICE YOUNG: You petitioned actually to allow the practice contrary to the *In re Credit Acceptance Corp*, the Court refused to do that, but said they would authorize a limited pilot project. We did so and then your court declined to follow the directions - the order of the Court. Do you find it troubling when parties ignore your orders?

JUDGE RICHARDS: I would never want a party to ignore my order, of course not.

JUSTICE YOUNG: Well, then tell me why it is your court seems to have a - at least with respect to this issue, the authority of clerks - seems to have a pattern of doing that?

JUDGE RICHARDS: It wasn't our clerks that do - did that, it was our court and the judges who went -

JUSTICE YOUNG: I - well, just a moment.

JUDGE RICHARDS: Yes.

JUSTICE YOUNG: This is a directive that came as a result of your request for - to experiment with this concept of clerks rather than judges rejecting party pleadings. You didn't get what you wanted, and it was a restricted one, I understand that it wasn't something that was not what you wanted, but that's what you got. Now on what authority did you as judges or the clerks exceed the scope of the pilot project order?

JUDGE RICHARDS: I would disagree with your statement that we sought to experiment with this idea.

JUSTICE YOUNG: This Court allowed an experiment. I know you wanted the full authority to allow your clerks to do whatever you wanted them to do.

JUDGE RICHARDS: No, that's not accurate.

JUSTICE YOUNG: This Court did not - this Court did not agree with that. We had a - we had a very delimited area within which your court was allowed during this pilot project to experiment, in my terms not yours -

JUDGE RICHARDS: Right.

JUSTICE YOUNG: with the concept of clerks being able to reject pleadings. That was limited as you've just characterized it to garnishment or to creditor issues, but you exceeded that - you included all civil matters.

JUDGE RICHARDS: As we want our proposal to include - all civil -

JUSTICE YOUNG: That's not - I don't care -

JUDGE RICHARDS: cases and district court cases.

JUSTICE YOUNG: I'm focusing not on which you want, but what you got. Now you candidly admit that you exceeded the order. Now why is that?

JUDGE RICHARDS: We exceeded the scope of the pilot project that you talked about, but we wrote a letter to the Court shortly after the pilot project started explaining how we were going to proceed with it and the forms that we included with that letter -

JUSTICE YOUNG: Did you get an order amending the scope of the project?

JUDGE RICHARDS: We did not get a formal order from the Court, no.

JUSTICE YOUNG: Now let me just ask you.

JUDGE RICHARDS: Yes.

JUSTICE YOUNG: When you issue an order and the party says well you know for reasons that perhaps you didn't anticipate I want to exceed the scope of your order, is that a sufficient basis for not complying with an order?

JUDGE RICHARDS: In that - in the way you ask it, no.

JUSTICE YOUNG: Well, why is that acceptable for your court to function?

JUDGE RICHARDS: Because we're talking about a practice which we have been doing for about twenty years, so we saw no harm in continuing in a modified way and consistent with the *Credit Acceptance Corp* case -

JUSTICE YOUNG: You saw no harm. You -

JUDGE RICHARDS: to do -

JUSTICE YOUNG: Judge?

JUDGE RICHARDS: it in modified way -

JUSTICE YOUNG: Judge? Just a moment; just a moment.

JUDGE RICHARDS: and we would not consider that an experiment since we've been doing it for twenty years.

JUSTICE YOUNG: Just a moment. The problem with your argument is that you wanted to do what you wanted; the Court said no, you can do this. And your argument to me just now is well we've been doing it anyway so we saw no harm in exceeding what the Court authorized. Is that a fair characterization of what you've just told me?

JUDGE RICHARDS: Not quite, no, I don't agree.

JUSTICE YOUNG: All right, tell me where I - where I went astray.

JUDGE RICHARDS: Well, for one thing this kind of pilot project we disagreed with the idea of a pilot project in the first place -

JUSTICE YOUNG: I agree with (inaudible).

JUDGE RICHARDS: because this was not a new idea, right?

JUSTICE YOUNG: Okay.

JUDGE RICHARDS: And so therefore we thought it harmless and within the spirit of the Court's authorization for a pilot project to do it on an expanded basis so that we could show the Court that this idea would work for all civil cases not just consumer garnishment cases. In addition, it was very - it would have been very difficult to instruct our clerks to follow one procedure for just consumer debt cases and a different procedure for when they saw flawed papers on other civil cases. So to manage the project that you asked us to carry out, that was the best way to that we conceived to carry it out.

CHIEF JUSTICE KELLY: Are there other questions of Judge Richards?

JUDGE RICHARDS: And by the way in our view the rule worked well, worked smoothly, and based on the pilot project and what we considered its successful operation we continue to urge a rule that would continue to allow clerks to return, not reject, I disagree with that characterization by the way -

JUSTICE YOUNG: All right.

JUDGE RICHARDS: and it's an important distinction because an older version of our rule would have allowed clerks to "reject" papers. We've sanded off that rough edge to the rule to allow clerks to only return papers and always subject to judicial review by the judges of that court. Our pilot project showed that that idea - that works well. We have still not received a single complaint about how that rule worked in our six month pilot project, and we continue to recommend it to the Court.

CHIEF JUSTICE KELLY: Thank you, judge.

JUDGE RICHARDS: Thank you so much.

CHIEF JUSTICE KELLY: Next is Ed Pappas, I think representing the Michigan Creditors Bar today.

MR. PAPPAS: Thank you, good morning. May it please the Court. I am appearing on behalf of the Michigan Creditors Bar Association, and we are opposing the proposed amendments. The ones that I'm addressing are the ones that were submitted for publication, but I will also mention the pilot program rule as well later on when I talk about the reasons. But we're opposing the amendments for several reasons. First and foremost, the proposed amendments as written are overbroad and they unconstitutionally delegate judicial authority to court clerks. We don't object to court clerks performing ministerial acts for the efficient operation of the courts, but the proposed amendments go far beyond ministerial acts. Under the proposed amendments the court clerk has judicial discretion to reject - and I use the word reject because returning and rejecting really with all due deference to Judge Richards - really has the same operation. But they have judicial discretion to reject pleadings and other papers if they determine that jurisdiction or venue is improper or that a filing is untimely or that damages stated in a default judgment do not appear to be correct - it doesn't say mathematically correct it just says correct - or that a judgment has expired or simply that the papers or other pleadings do not comply with Michigan court rules or Michigan statutes. These decisions which are to be made by court clerks under the proposed amendments require legal analysis, interpretation of court rules and statute, and judicial discretion. And under the proposed amendments that were published there is no provision for judicial review of the

clerk's decision except in the case of defaults and garnishments. And the proposed amendments, again as published, also create statute of limitations problems - potential problems for parties who - for a party whose complaint is rejected because the date of filing the corrected complaint does not relate back to the original filing date. I think the statute of limitations problem can be resolved either by having a relation-back provision, but probably a better result would be to follow the Court of Appeals process when they reject papers for clerical mistakes they give notice of the mistake and give the party a certain amount of time to correct the mistake, and then if the party corrects the mistake - that's done all before any paper is rejected - this avoids any kind of not just statute of limitations problems but other timing problems that may occur in these areas.

There are two other concerns that I want to mention briefly about the proposed amendments as written. First, each garnishment form under the proposed amendments may only have a single defendant, but it's not uncommon for judgment debtors to hold assets jointly or for there to be a joint and several judgment against multiple debtors. And under these circumstances multiple garnishments or multiple garnishment forms are only unnecessary but they actually could be confusing for the garnishees. And secondly, the proposed amendments allow the clerk to retain a filing fee if a writ of garnishment is returned. To file a corrected writ you have to file another filing fee which doubles the cost of the writ and this amounts to a sanction that should only be imposed by a judge. Now I understand that these proposed amendments were originally generated as a result of concern for the high volume of debt collection actions filed in the 46th District Court. But I've had an opportunity to review how good collection firms operate and they do their work very efficiently and very professionally. And these proposed amendments not only fail to remedy that limited concern, but they expand their application to all courts and to all papers and all pleadings and this could potentially adversely affect not only collection lawyers and their clients, but all lawyers and their clients, consumers themselves, and pro se litigants. And it could create more barriers for full access to our courts. No rule or law should be adopted based upon the unique experience of one court, nor based on the existing personnel of one particular court. Now I have no doubt that the drafters of the proposed amendments or

the 46th District Court, both of them, have good intentions with these proposed amendments. And, frankly, there are some of these proposed amendments that are good changes. And the Michigan Creditors Bar Association is willing to work with the Supreme Court's workgroup and the 46th District Court to develop a court rule which would address the concerns I've raised and others have raised with the proposed amendments. And just briefly about the pilot project proposal which is different than the proposed amendments which were subject for publication, those amendments are actually better with respect to judicial review and the relation-back provisions, but they still are an unconstitutional delegation of judicial authority to court clerks because the clerks have judicial discretion to reject papers which do not comply with the Michigan court rules or statutes, and that's a very broad provision. And that's the provision that needs to be worked on to have a rule that works and keeps this to ministerial acts for the efficient operation of the courts. So as the rule stands today, the Michigan Creditors Bar Association joins with the State Bar of Michigan and its Civil Procedure and Courts Committee and its Consumer Law Section and its justice policy initiatives in opposing the proposed amendments as written for the reasons that I've stated and also for the reasons that were stated in written materials previously provided to the Court.

JUSTICE YOUNG: Counsel?

MR. PAPPAS: Thank you and I'm happy to answer any questions.

JUSTICE YOUNG: I appreciate your offer to continue negotiating, but in light of your premise, I think the first premise, is that the - both the rule and the project exceed the constitutional scope of clerical duties. If that's an accurate statement of your premise, what ground is there for negotiation?

MR. PAPPAS: Well, the premise is based upon the areas that I specifically mentioned that I believe do require legal analysis and are an unconstitutional delegation of judicial authority, but many of the provisions in the - in the proposed amendments are simply ministerial acts.

JUSTICE YOUNG: Give me an example would you.

MR. PAPPAS: Pardon?

JUSTICE YOUNG: Give me an example would you?

MR. PAPPAS: Checking a pleading for signatures. The - whether they filed filing fees. I mean you - there is a list - and I would venture to guess and one thing about the pilot program that we didn't find out is of the great number of papers that were returned why were they returned. And I would venture to guess that there is - there are some categories of ministerial acts and ministerial mistakes that clerks can look at which will help resolve some of the issues and make the courts more efficient and that's what I was talking about working with the group to limit the returns to ministerial acts and to deal with the other concerns that we - that I had expressed.

JUSTICE YOUNG: But I guess my question is a fairly broad one. In the *Credit Acceptance Corp*, this Court rejected the notion that clerks had to perform judicial functions. Why isn't that the appropriate legal standard here? I mean what more do we need to say other than what we said in *Credit Acceptance Corp*?

MR. PAPPAS: I guess the question is what constitutes a judicial function.

JUSTICE YOUNG: So - so you think we now need a - an iteration of a catechism for every potential ministerial act?

MR. PAPPAS: No, and that's what -

JUSTICE YOUNG: Is the system broken? I mean it seems to me the 46th District Court is unique in its own perception of its needs. So I mean you've mentioned in your remarks that one court and one court staff shouldn't wag the dog of the judicial system. I'm trying to get my arms around why we need to make a change at all from the *status quo ante* stated in *Credit Acceptance Corp*.

MR. PAPPAS: Well, I'm not saying that - that you do have to make the change, but if it does help the efficient operation of the courts. For example, there are a couple of provisions right now in the court rules on summonses that allow clerks to not accept and I don't know if they go to the extent of returning, but not accept summonses that

don't comply with the ministerial requirements set forth in the court rules. That's the type of thing that I am talking about, and if it helps - I mean I have heard the story that - from Judge Richards that sometimes divorce actions are filed in the district court - if it helps with the efficient administration of the courts and it is only a ministerial act versus a judicial act then I think that we would be willing to work with the workgroup and the 46th District Court to see if we can come up with a rule that works for them.

CHIEF JUSTICE KELLY: Did I understand you correctly to say that the results of the - of the pilot study indicated that a large percentage of the - of the errors were what you would term ministerial matters?

MR. PAPPAS: What I actually said is I don't know because they only had the - when I read - what I read in the report they only had what went to the judges so of the 240 a month that were returned I was saying I am assuming that those were ministerial -

JUSTICE YOUNG: There's no data on why -

MR. PAPPAS: There's no data, right.

CHIEF JUSTICE KELLY: Okay.

MR. PAPPAS: And if they were, my guess is that you'll be able to categorize what most of those mistakes were.

JUSTICE CORRIGAN: I thought that there was a chart that was provided that laid out some of the reasons in the study that the 46th District Court had submitted.

MR. PAPPAS: My reading of the chart was that that was the ones that went to the - to the judges as for judicial review, but maybe -

JUSTICE CORRIGAN: Okay, I see.

MR. PAPPAS: I didn't see the other chart.

JUSTICE CORRIGAN: All right. Did - you don't have any way and we don't have any way to estimate if the project had stayed within the scope that was authorized how many actual consumer debt cases there were that were kept.

MR. PAPPAS: No.

JUSTICE CORRIGAN: We don't know that. Okay, thanks Mr. Pappas.

CHIEF JUSTICE KELLY: Thank you.

MR. PAPPAS: Thank you.

CHIEF JUSTICE KELLY: Next is Patrick Clawson.

MR. CLAWSON: Good morning ladies and gentlemen. Thank you for having me here this morning. As many of you know, I'm a legal investigator and a process server out of Genesee County, and I work statewide and I have experience with clerks all over the state of Michigan. I would encourage the court to be reluctant to grant clerks any type of authority to begin making legal judgments on pleadings or any type of filings that they receive before the courts. I've met many very capable clerks across the state, but at the same time I've met some that are just not so capable. And, frankly, I think that legal decisions need to be made by attorneys and by judges not by clerks. There are a couple of issues involving -

CHIEF JUSTICE KELLY: What about - Excuse me, let me just interrupt you and ask you this.

MR. CLAWSON: Yes, Ma'am.

CHIEF JUSTICE KELLY: Would you make an exception for obvious errors such as failure to have a signature on the signature line?

MR. CLAWSON: Absolutely.

CHIEF JUSTICE KELLY: Or filing a divorce in the wrong court?

MR. CLAWSON: Basic ministerial type of things I would have no issue with. For instance, recently I had a process sent to me to be served out of Genesee County Circuit Court. The address of the court wasn't even included in the pleadings or in the - in the summons. That type of clerical type of error is something that I think a clerk could review and that would be a proper role for a clerk to

review. But to make decisions about whether or not venue is proper in a particular case I think that's a legal decision that really requires an attorney or a judge to make a decision. There are a couple of other areas however. I would encourage the Court to take a look - and its amendment of §2.113(c) to require email addresses of counsel to be included in all pleadings that are filed with the courts here. It's increasingly difficult to make contact with attorneys by telephone often in these cases, and having an email address on the actual pleading would help facilitate communications a great deal. It would also help the court as the court goes into an era of electronic filing. I would also ask the Court to amend rule 8.119 to include a requirement that the clerks provide stamped conformed copies to parties in such quantities as may be reasonably requested by the party. We are having a serious problem in Genesee County in the 68th District Court also in Lapeer County Circuit Court where the clerks are either refusing to provide stamped courtesy copies when you make a filing or they will give you only one or two possibly when you need more copies. I'm told in the case of Lapeer County this is because of advice that they received - a directive they received from Amy Byrd who is a State Court Administrative Office staffer who has advised them they have no obligation to provide stamped copies to litigants and so, therefore, the Lapeer County Circuit Court has now refused to provide any kind of a stamped filing copies to any litigants. I will tell you that that causes me a great deal of problems with clients of mine especially from out of state who want to have some kind of proof that a document was actually filed with the court. In Wayne County when I go to file documents down there the clerk's office maintains a stamping machine and you can go ahead and stamp your own copies. The 68th District Court - I've been having an ongoing discussion with the court administrator there about the ability to be able to get sufficient copies of - stamped copies.

JUSTICE YOUNG: These are copies that you supply -

MR. CLAWSON: These are copies that I supplied. Sir, when I go into 68th District Court in Flint often I will have a spirited discussion with the court clerk there who is busy reading a paperback book or discussing weekend events with her coworkers and they're absolutely bothered to do any kind of stamping. I don't know how much effort it takes to put a document into a time stamp machine - it

can't be much - but it is a problem in a number of the courts. So I would ask the Court -

JUSTICE YOUNG: Sir?

MR. CLAWSON: Yes.

JUSTICE YOUNG: The two issues you've just raised are outside the scope of this, but do you know Mr. Gromek?

MR. CLAWSON: I'm sorry, sir?

JUSTICE YOUNG: Do you know Mr. Gromek?

MR. CLAWSON: I do not.

JUSTICE YOUNG: It's that very handsome white haired gentleman. He is the SCAO administrator.

MR. CLAWSON: Well, that's fine. I would be happy to -

JUSTICE YOUNG: You might - you might want to talk to him about some of these -

MR. CLAWSON: I have called his office, sir; I haven't talked to him directly.

JUSTICE YOUNG: Well, you now see him, you know who he -

MR. CLAWSON: I will be happy to chat with him. But I will tell you point blank your honor that some of the clerks have told me that they - for instance in Lapeer County they have told me that they absolutely will not provide any kind of stamped copies for the public unless there's a court rule to that affect because of the advice they've received from the SCAO.

JUSTICE YOUNG: Perhaps Mr. Gromek might be interested in talking to you.

MR. CLAWSON: I certainly - I certainly would bring that up. One other matter. In the pending procedure - in the pending rulemaking that's here, court rule MCR 2.102 is addressed somewhat. I would ask the Court to consider an amendment to that rule that a summons would not be

dismissed for failure to file proof of service unless five business days have elapsed from the time of the expiration of summons. We're having a problem in some courts in this state - 68th in Genesee is pretty notorious for this, also the district court down in Warren. As you know, a summons expires at 11:59 p.m. Often we have now because of the depression a great deal of trouble finding defendants. Often we are going right down to the last minute to be able to find defendants to be able to get them served and we'll serve them on the last day of the summons - of the validity of the summons. However, when we go into court the next morning in some courts like 68th, they have immediately dismissed the action for failure to file the proof of summons - proof of service in the case. It seems to me that if I file a - if I serve a defendant on 8 o'clock on a Thursday night and I go to the court at 8 a.m. the next morning to file the summons - to file the proof of service in the case, that the court should not have already dismissed the case for failure to file proof of service. There's simply not enough time to be able to physically do it. We have a problem in the metro Detroit area now because the postal facilities have been consolidated in Pontiac where often it takes four or five days to get mail from Detroit to Flint. So if attorneys are mailing proofs of service to the court they're coming in after the fact. Frankly -

JUSTICE YOUNG: May I suggest that -

MR. CLAWSON: Yes, sir.

JUSTICE YOUNG: that you put your - the other rule requests that are not associated with this particular issue in writing and request that the Court consider those.

MR. CLAWSON: I certainly will, sir. I brought these to the attention of the Court today because it was addressing the powers of clerks and some of these specific rules or sections were at least being discussed in this proceeding. But it is a problem.

CHIEF JUSTICE KELLY: Thank you.

MR. CLAWSON: Thank you, Ma'am.

CHIEF JUSTICE KELLY: No one is here on Item 2 on our agenda so we'll move on to Item 3 which proposes reducing

the time for filing appeals in some criminal matters and for filing motions. Here to speak on this first is Jonathan Sacks from the State Appellate Defender Office.

ITEM 3: 2009-19 - MCR 6.425 etc.

CHIEF JUSTICE KELLY: Good morning, Mr. Sacks.

MR. SACKS: Good morning. May it please the Court. I'm a Deputy Director of the State Appellate Defender Office, and one of my duties at the office is to oversee cases during the intake process to figure out when transcripts are ready, when they're ready for assignments. We take in give or take about a quarter of Michigan appeals which is a statutory mandate, and that adds up to - it various year to year but about 600 either trial - trial and guilty plea cases in combination and we handle all those appeals. There are - I mainly want to focus on the rule dealing with appellate deadlines - the appellate deadline proposal 7.204 and 7.205. We've also submitted comments on the 6.500 proposal, also on the student - students arguing in the Court of Appeals and on the case management deadlines. So I'll take your questions on any of those issues as well. But for my main issue here which is the appellate deadlines proposal, there are a few things I want focus on. The first is looking at intake and when transcripts do come ready on these cases we really do feel that there will be a denial of the constitutional right to appeal specifically for guilty plea cases. What happens - and we ran these numbers - is in the year 2009 we had I believe 253 plea cases where we represented clients on appeal. More than half of those -

JUSTICE CORRIGAN: Is that out of the 600 total?

MR. SACKS: That's a -

JUSTICE CORRIGAN: 253 were pleas -

MR. SACKS: That's correct. The rest -

JUSTICE CORRIGAN: and the balance would have been trials.

MR. SACKS: That's correct, yes.

JUSTICE CORRIGAN: Okay.

MR. SACKS: Of those 253 we came up with 53% where the transcripts were ready after 56 days. Now with the various excusable neglect extensions that are built into this new court rule the most that is given gets up to 56 days which means for over half of all plea appeals we just won't have the information to do an appeal before the deadline runs. And that's the end of it; it's a devastating impact. Now the rule does run the time off of the six months for making a motion for resentencing or motion for plea withdrawal which obviously gives - gives more time than just 56 days. But the fundamental problem with having this - the time run off this section in the rule is that you have a whole lot of cases where trial attorneys do their job. They - and it's what we like to see. There are proper objections to sentencings. If there's a defendant who wants to withdraw his guilty plea prior to sentencing, there's an attempt to do that. And the last thing we want to do is go back to a trial court and repeat arguments that are already made. It's debatable whether it's even ethical to do that when a judge has ruled on let's say a challenge to offense variable 7 and we file paperwork that said well judge we disagree with offense variable 7, we know you've ruled, we know the attorney preserved it already, but we're here because it's the only way to preserve this deadline. It's - not only is it gonna clog up the courts, but our real problem is it means our clients are not going to be able to appeal on guilty pleas. It'll be guesswork; we'll have to file shelves of leave applications within 56 days without having the transcripts, without having full information. We can't take the risk of waiting for the six month deadline because there's a whole lot of litigation as this Court knows that goes on with the proportionality of a sentence for example - the recent *People v Smith* case - and the *People v Weibrecht* (phonetic) case indicates that you can only raise proportionality challenges in the appellate courts not in the trial courts so we can't do that after six months. Frankly, half our clients won't be able to properly appeal guilty pleas with these changes, and that's the fundamental problem. I also wanted to briefly talk about what was going on in other states though because reviewing the comments they are overwhelmingly against these changes - the State Bar, the various sections of the State Bar, the Criminal Law Section, the Appellate Practice Section, the Court of Appeals Court Rules Committee, the Attorney General of the state of Michigan, the Livingston County Prosecutor - but the one voice that seems to support

these changes indicates that it's what's going on in every other state - every other state has these deadlines.

JUSTICE CORRIGAN: Is that false?

MR. SACKS: It's comparing apples to oranges judge - Justice Corrigan. What goes on is Michigan is consistent with other states with claims of appeal. Michigan has a 56 day deadline to file briefs on appeal in claims cases. We reviewed what goes on in other cases - in other states and it's between 10 to 90 days for filing on a right to appeal.

JUSTICE CORRIGAN: Do other states have two tiered systems where you first get a claim and then you get a delayed app if you missed the claim?

MR. SACKS: For the most part they do not.

JUSTICE CORRIGAN: That's - that's unique to Michigan isn't it?

MR. SACKS: It's not unique to Michigan; there are some others. Virginia for instance allows a six month delayed application after the claim, Arkansas allows a 1.5 year belated appeal, Missouri a one year belated appeal, New York a one year belated appeal. So there are - Ohio allows any sort of deadline within reasonable cause. So there's definitely other states that follow Michigan's lead.

JUSTICE CORRIGAN: There's not a majority though.

MR. SACKS: But it's not a majority view that's correct. But the reason it's apples and oranges is this. We have a constitutional right to guilty plea appeals here. That is - that is not common in many other states. We also have a system for guilty plea appeals where it has to be by a leave application where it's a straight jurisdictional deadline that does not run from transcripts. So the majority of these states that have this 10 to 90 day limit, including Michigan, for trial appeals that deadline runs from transcripts. So when we get guilty plea appeals -

JUSTICE CORRIGAN: Well, what's the matter with altering the rules to make it run consistent with transcripts?

MR. SACKS: I suspect depending on the time we would have no problem with that. The -

JUSTICE CORRIGAN: So what if there was one single appeal instead of claim and delayed appeal, but the single appeal ran from the filing of the transcript? Would that not be a simpler system ultimately?

MR. SACKS: It could be a simpler system; it could solve the problem. Unfortunately, that's not the proposal we have here today.

JUSTICE CORRIGAN: Understood.

MR. SACKS: And that's the real issue.

JUSTICE YOUNG: Well, what is wrong with a system that allows for a single tiered appeal but runs from the date of the filing of the transcripts?

MR. SACKS: The only thing we would need to be sure with that is we - the court rules do allow for motions for plea withdrawal and motions for resentencing within the six months. So we would just need to make sure that that would be consistent in those appropriate cases where the way to represent a client is off those six months - the time could run after that decision is made as well.

JUSTICE CORRIGAN: Why should a plea withdrawal have a six month time limit? Why shouldn't that be shorter? Why do you need six months to decide whether your plea was valid?

MR. SACKS: Six months for us is a fair time that works. I don't know exactly what ideal time would be. I do know the 56 days is much too short because the time it takes for transcripts to come. I could go back and look at our - sort of averages for when transcripts come -

JUSTICE CORRIGAN: How do they do it in other states?

MR. SACKS: In other states?

JUSTICE CORRIGAN: They don't require plea withdrawal motions in the trial courts, right?

MR. SACKS: Many of them do not that's correct. Some do, some require some sort of basic preservation to make those motions, but many do not. Basically what we have is we feel is a system that works perfectly, that wouldn't - nothing works perfectly - but a system that works very well. The Court of Appeals and trial courts both deal in very timely and appropriate and efficient manner with these cases.

JUSTICE CORRIGAN: When Mr. Baughman says that the defendants can be prejudiced in federal district court consideration of their habeas motions because of the absence of a one year time limit in the rules is he saying something false to this Court?

MR. SACKS: Because that - this is shifting now to the 6.500 collateral appeal issue.

JUSTICE CORRIGAN: Well, there's the proposal for the one year limit.

MR. SACKS: That's correct.

JUSTICE CORRIGAN: Right. And other states as I read his submission overwhelmingly have a one year time limit as do the feds. The question I have is is he correct when he states that defendants in Michigan are being prejudiced in consideration of their petitions because of the absence of the one year time limit, true or false.

MR. SACKS: He's not being dishonest, but it's an interpretation with which we completely disagree. Here's what happens on collateral appeal for our clients and this is part of our day-to-day advice when the appeal ends. Let's say a case is done - either a plea case or a trial case - this Court denies leave to appeal which is what the standard thing that will happen in an appeal case. We then either meet with our clients or send a closing letter explaining their options. And what we will explain to them is if there is a federal constitutional issue and you choose to file a habeas petition here is the deadline. If, however, there's newly discovered evidence in your case or a change in law or some necessity or else we were ineffective and missed an issue and there's some necessity to file a motion for relief from judgment first, you need to realize that motion needs to be filed within that deadline in order to toll the time for habeas. But we tell

our clients if that is not the case and it's a simple - it's a situation where you have a constitutional issue, you want to file a habeas petition, you need to know it needs to be filed within a year and 90 days. However, you also need to know if eight years from now there's a new investigation that starts to uncover new information then at that point you can still file a motion for relief from judgment. So there's sort of two tracks. One is for the motion for relief from judgment to work with the habeas petition - that's what Mr. Baughman is talking about. And for the motion for relief from judgment issues to be part of the habeas petition and that's great and that's fantastic, but there are a lot of clients that we have and cases that we've seen and folks who have walked out of prison because of things that happen later than that one year and 90 days. We're working now with the Wayne County Prosecutor's Office on Detroit Crime Lab cases. We corroborate with them very carefully. There's a procedure where evidence is retested on these cases and - by the State Police and depending on the results we agree or disagree, but maybe there should be a new trial. This process takes years. In all the time we've worked - been working we've only received results on a few cases so far and we've agreed to new trials on two of those cases already - very serious cases. And I question whether there's a one year limit to 6.500s - whether that will be a possibility. Habeas is only half the picture, so for that reason I don't feel Mr. Baughman is being dishonest, but I feel like he's being incomplete and we very much disagree with that interpretation.

JUSTICE CORRIGAN: Would you be willing to submit your standard advice letter to clients that you send so that the Court could see what you advise them if there is such a standard letter? That would be helpful in understanding this.

MR. SACKS: I can submit something. I think there's a lot of attorney discretion involved - not everybody has the same letter, but I'd be happy to submit what I send to clients.

JUSTICE CORRIGAN: Thank you.

MR. SACKS: You're welcome.

CHIEF JUSTICE KELLY: Are there other questions of Mr. Sacks?

MR. SACKS: Thank you very much.

CHIEF JUSTICE KELLY: Thank you. Bridget McCormack. Good morning Ms. McCormack.

MS. McCORMACK: Good morning. May it please the Court. I am the Associate Dean for Criminal Affairs at the University of Michigan Law School. I've been a clinical teacher for 14 years, and I'm currently the co-director of the Michigan Innocence Clinic. I enthusiastically support the proposed change to Rule 8.120 - the student practice rule - and I hope the Court adopts it. I have supervised students who have argued in the Sixth Circuit Court of Appeals and I previously taught at a law school in Connecticut where students regularly argued in the Second Circuit Court of Appeals, and so I do have some experience with students in appellate courts and I'm willing to answer questions on that rule if the Court has any, but I believe the comments are thorough.

I want to spend the rest of my time - my short time this morning addressing the proposed change to Rule 6.500 - specifically the one year time limit that Justice Corrigan was just asking Mr. Sacks about. And I don't plan to reiterate my written comments to the Court because I am sure you've already read those as well as the other comments that were submitted by many people. I want to instead with the Court's permission introduce my client, Dwayne Provience, who's gonna come speak to you next who's sitting in the fourth row. Mr. Provience was convicted of murder and served nine years in prison, and he is - and he was innocent - he did not - he did not kill anybody. He did not have anything to do with the killing he was convicted of. He was exonerated on March 24, 2010 by students in the Innocence Clinic. He was represented at trial by an attorney who has since been disbarred. Had his attorney actually read the police reports or done minimal investigation he would have found what my students - Innocence Clinic students found in 2009 - eight years after he was convicted - significant evidence in the police investigation files that showed that someone else killed the victim in this case. That significant evidence was actually featured by the Wayne County Prosecutor's Office in a related trial two years after Mr. Provience's trial

where the murder that Mr. Provience was convicted of needed to be explained. The explanation from the prosecutor's office was that Mr. Provience didn't have anything to do with it. So you can see that the evidence that exonerated him wasn't hard to find. I wish I could take real credit for finding it or I could give my students real credit for finding it. We didn't do anything special; we looked in police files. Unfortunately for Mr. Provience, his attorney never did that. Under the new proposed rule, Mr. Provience would not have been able to bring all of the evidence of his innocence to the attention of the Wayne County Circuit Court in 2009 because it - all of it could have been discovered - indeed absolutely should have been discovered earlier with due diligence. His trial and appellate lawyers failures to discover this evidence years earlier would have prevented him from raising any of it in 2009 even though all of it exonerated him and also pointed to the real killers.

JUSTICE YOUNG: He wouldn't have an ineffective assistance of counsel claim?

MS. McCORMACK: I believe he has - he should have had an excellent innocence - ineffective assistance of counsel claim - excuse me - but unfortunately -

JUSTICE CORRIGAN: Isn't there a violation of *Brady* (phonetic) duties too?

MS. McCORMACK: Absolutely. In fact, to the Wayne County Prosecutor's Office's credit they agreed that he deserved a new trial. They actually agreed that his motion should be granted. But the new proposal unfortunately would bar innocent defendants from presenting evidence of their innocence that wasn't presented before because of ineffective assistance.

JUSTICE CORRIGAN: Ms. McCormack? I just have a question.

MS. McCORMACK: Yes.

JUSTICE CORRIGAN: There are other Innocence Clinics in other states aren't there?

MS. McCORMACK: Yes, there are.

JUSTICE CORRIGAN: How do they operate within the framework of a one year limit on the filing since that seems to be the majority position in the U.S.? How do those clinics operate within these constraints?

MS. McCORMACK: I think that if you heard testimony from the director of every Innocence Clinic around the country even in states where there is no time limit and there are some of those as well, like Michigan, they would all say whether there's a 90 day time limit, a 1 year time limit, or no time limit, that it's extremely difficult to exonerate someone even sometimes with DNA evidence. The vast majority of exonerations have come because prosecutor's offices have joined with the Innocence Clinics in seeking relief for the innocent.

JUSTICE CORRIGAN: Would anything prevent you from presenting the evidence of innocence to a prosecutor and asking them to join you?

MS. McCORMACK: Nothing prevents us from doing that at all. In fact, Justice Corrigan, we do that in every case because hopefully - Frankly, that's a better way to go about these cases, and it's better for everybody. As you're I'm sure aware, there is sometimes resistance from prosecutor's offices who for understandable reasons or in cases where there's not DNA evidence, which is the vast majority of felony convictions, there might be differences of opinion about exonerating evidence, and sometimes prosecutor offices can be reluctant to admit that they got it wrong.

CHIEF JUSTICE KELLY: So in those cases it would be much harder for you to free an innocent person if this rule were passed, is that right?

MS. McCORMACK: I think it would not only be harder it would be nearly impossible. In our clinic we have had almost 4,000 people I believe write to us for assistance. We've reviewed 1,200 of the applications that have been submitted in the almost two years that we've been operating - I guess not quite two years - two years in January. That's with a team of full time students and we have four law firms that have lawyers volunteering to review the applications as well. The Court should know we reject the vast majority of people who apply to us - almost everybody is rejected. But we want to do a thorough review before we

reject people so that we can feel good about having done that and not have to relook at it. But people are waiting a good 18 months before we can look at their applications - probably some of them longer than that. Nothing we can do about that; we're working a lot. We can't get through them any faster. But frankly, every single person who has written to us and has an application on file that's been on file with us for more than a year now should be - can be said to be barred by this rule because if they wrote to me 18 months ago with their new evidence of innocence, they could have done something about it and they didn't within that one year so it would obviously be devastating for my clinic, but that's not a reason for the Court to - I'm sorry - to make policy.

JUSTICE CORRIGAN: So you're not the only individuals in the system, correct?

MS. McCORMACK: Of course, that's - I was about to say you shouldn't - Obviously, I don't want you - I don't want you to make rules because of my clinic, that's not - that's not what I was here to say, I was just answering Justice Kelly's question. I believe for actually most of the innocent defendants who will never come to my attention or will have other attorneys - the State Appellate Defender's Office or other attorneys representing them - the rule will be devastating because in most cases they will have been - they should have been able to find the evidence by exercising due diligence. It's a problem of poor lawyering that has prevented them from finding the evidence in the first place. And so - and that problem insulating the poor lawyering by this new time limit is one I hope this Court is concerned about. We can't fix the state of lawyering - or this Court can't fix the state of lawyering across the - across Michigan right now, but at least Michigan can leave the door open for innocent defendants.

JUSTICE YOUNG: Apparently we can by having students practice as lawyers.

MS. McCORMACK: I don't think - I don't think the students can do nearly enough of the work to fix the problems across the state, Justice Young.

JUSTICE YOUNG: I had some interesting reflection on the quality of the Bar.

MS. McCORMACK: Well, I do think the students do excellent work. To be fair to practicing lawyers they have an unfair advantage. They're often working on you know one or two cases for a lot of credits of work and they have an awful lot of time and an awful lot of energy to put into one case. They're not trying to manage a law practice where they have a busy docket and lots of clients and lots of things to do. So they have a bit of an unfair advantage in my view.

JUSTICE YOUNG: Oh, they have an exception from professionalism.

MS. McCORMACK: I'm sorry?

JUSTICE YOUNG: They have - students have an exception from professionalism.

MS. McCORMACK: No, absolutely not.

JUSTICE YOUNG: Well, I thought - I thought lawyers were only supposed to take those matters that they could competently handle ethically.

MS. McCORMACK: I think that is the rule. My understanding is that is the rule.

CHIEF JUSTICE KELLY: Thank you Ms. McCormack.

MS. McCORMACK: Thank you very much.

CHIEF JUSTICE KELLY: Dwayne Provience. Good morning, sir.

MR. PROVIENCE: Good morning. May it please the Court. My name is Dwayne Provience. I'm an exonery from the U of M Michigan Innocence Clinic. I've been out going on a year now from - since November 24, 2009, and I'm just here to talk about the bill that attorney Ms. Bridget McCormack just talked about as far as the limitation on the 6.500 proposal. I just want to say that I think that's a bill that shouldn't be passed because you know I'm a good example of what if that bill was implemented when I was going through my process proving my innocence I wouldn't be here right now with my freedom right now with my family, with my mother who's sitting in the back row. I've been locked up for ten years and if that bill - if the bill

that's been proposed is - would have been passed during the time I was incarcerated fighting my case to regain my freedom like I said I wouldn't be here right now. And I just think that's a bill that hopefully on respect to the Court that Justices will really take a look at it and understand that that would be a bill that would be very detrimental to a lot of people who may be innocent, who's trying to fight for their freedom, but it may take years before they can prove that - prove that. And if that bill was implemented I mean I think that would jam a lot of people up and I think it would be - I think it would be real bad. So I'm just an example hopefully you know I'm standing here now thanks for that I can - thanks that I can have a second chance getting back into court with a success of 6.500 without a limitation on the bill so I'm just hopefully you know you Justices please can really take a look at that bill and hopefully you know really understand that that bill is I think is a bad bill to be passed. Thank you I don't - that's all I wanted to say. Thank you.

CHIEF JUSTICE KELLY: Are there questions? Thank you sir, appreciate it. The next item is #4 which is a proposal to allow law students and recent law graduates to participate in oral argument in the Court of Appeals. And here to speak on this matter first is Jules DePorre. If Mr. DePorre isn't here we'll move to Imran Syed.

JUSTICE YOUNG: He's here.

CHIEF JUSTICE KELLY: Oh, I'm sorry, sir, I didn't see you there.

JUSTICE YOUNG: Other side.

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MR. DePORRE: Hello, my name is Jules DePorre, I'm a recent law grad and so I'm still getting the hang of the swinging doors. I'm a law clerk to Judge Sean Cox in Detroit and I'm a recent grad of the U of M Law School where I participated in the clinical law program. As Dean McCormack suggested, she has had several students who have participated in oral argument before the Sixth Circuit and I was one of the fortunate ones to have that experience. I believe it was a highlight of the - my experiences in law school, and I'd just like to discuss it briefly with the Court. The case that we were assigned was a habeas

petition. It was granted by the federal district court and the state was appealing. And my clinic and I began preparing a brief and one of the things that I learned is that federal appellate cases take a long time. And so I stayed on with the clinic for another semester to continue working on a response brief to the state. I worked very closely with the supervising attorney. We did legal research, we edited our brief, we revised, we hashed out legal arguments, and again we worked very closely with the supervising professor who was constantly giving us feedback. And I think that was something that helped us to develop our skills - my skills in particular, my legal writing skills, legal research, and oral advocacy skills. Several months later the case was assigned to a panel and I continued working at the clinic and the professor - the supervising professor asked if I would like the opportunity to present oral argument before the Sixth Circuit and I jumped at the chance. And I again spent a great deal of time preparing for that. I went through the record again, I went through the state's arguments again, I was able to split time with the supervising professor so I only spoke on one aspect of the case. It was an ineffective assistance of counsel claim, and I spoke on the merits of the claim and then my professor spoke on the procedural default issues. So by splitting time she was able to handle the more complicated and, frankly, in the Sixth Circuit at the time the law - there was some contradicting case law. And I think the court probably would have appreciated her - as her expertise was in that area - speaking to that issue where I was able to address the merits which were pretty straightforward. So I just would speak in favor of this rule because I think that the opportunity that it gives students for experiential education, whatever you want to call it - sort of a buzzword. Many professions have something similar. As a teacher, I was a teacher before I went to law school, and I student taught. My wife is a med student and she's in her third year where they do medical clerkship programs and do practice medicine under the supervision of an attending physician. This is a very similar program where we're practicing law under the supervision of an attorney professor.

JUSTICE CORRIGAN: Is it Mr. DePorre? Is that how I say your name?

MR. DePORRE: DePorre.

JUSTICE CORRIGAN: DePorre. In the oral argument you did in front of the Sixth Circuit did you have the client's explicit permission for you to appear and argue on the record? Did you -

MR. DePORRE: I did.

JUSTICE CORRIGAN: Okay.

MR. DePORRE: The -

JUSTICE CORRIGAN: And they routinely did that when students were arguing so the client was well aware then.

MR. DePORRE: Correct. The Sixth Circuit rule requires it.

JUSTICE CORRIGAN: All right.

MR. DePORRE: So the Sixth Circuit - I think its rule - local rule 46(c) that allows for student representation. If you're representing an indigent client you have to have written permission and you could also represent the state in which case you need to get permission from the attorney general's office.

JUSTICE CORRIGAN: If the client objected to how you handled the oral argument or the appeal, would the supervising attorney be the person that they - that would be complained against in the Attorney Grievance Commission because we have a huge number of complaints by defendants about their lawyers representation. How does that piece work?

MR. DePORRE: Yeah. It would be -

JUSTICE CORRIGAN: It would be the supervisor? Okay.

MR. DePORRE: I would be bound by the professional canons - or the professional rule - Model Rules of Professional Conduct and the Sixth Circuit rule also requires that the student certify in writing that they've read the professional conduct rules of their state and are familiar with those rules. So that was one requirement that they make sure that the students are familiar with it,

but then if there were to be any grievances that would be directed against the supervising attorney.

JUSTICE MARKMAN: Mr. DePorre when you say that you would have been bound by the rules of professional conduct, does that mean you would have taken an oath to that - to those rules?

MR. DePORRE: No, your honor. I did not take an oath ahead of time. I do - I do think that those rules apply to me and I did my best to follow them because that's what the Sixth Circuit rule required of me.

JUSTICE YOUNG: The current rule does not, as I can see, contain any requirement that the client approve of the student's participation on his or her behalf, is that right?

MR. DePORRE: The proposed rule does not. The Sixth Circuit rule does.

JUSTICE YOUNG: Our current rule doesn't. I mean we allow students to represent parties in trial courts currently.

MR. DePORRE: Correct.

JUSTICE YOUNG: Do you think it's a salutory change to require the explicit approval of a client to have a student represent them?

MR. DePORRE: I don't because I think that when they're going to seek representation from the Michigan Clinical Law Program or another clinic in the state that that's something that's understood.

JUSTICE YOUNG: You think?

MR. DePORRE: Yes, I do.

JUSTICE YOUNG: Well, why - if it's understood, then why wouldn't you want an explicit understanding?

MR. DePORRE: They make it explicit in the retainer agreement.

JUSTICE YOUNG: But it's not required in the rule.

MR. DePORRE: That's correct.

JUSTICE YOUNG: Why wouldn't we have at least a parallel requirement that the Sixth Circuit requires?

MR. DePORRE: You certainly could; I just don't necessarily think that - I think it may be redundant because the schools would make that clear in their retainer.

JUSTICE YOUNG: But it's not - they're not required to do that.

MR. DePORRE: No, they're not.

JUSTICE MARKMAN: Are you confident that this case was presented as affectively to the Sixth Circuit Court of Appeals as it could have in two parts as you've described or that possibly this could have been a more compelling and effective argument had it been presented by the same individual as part of a single presentation?

MR. DePORRE: I am confident that - that we were affective in presenting the case. I made sure that I understood the procedural default issues so that if the court was to ask me any questions on those procedural default issues I would be prepared with a response. I also was fortunate in that we were mooted beforehand. A panel of professors volunteered to spend an afternoon and moot us both - me on both issues and also mooted the supervising attorney before arguments.

JUSTICE MARKMAN: If you were to have presented that same case before the Michigan Court of Appeals, would it have been as a law student or as a graduate? In other words, what was the chronology of your appeal? Had you graduated at the time?

MR. DePORRE: I had not. I was a third year law student. I think the current rule and the proposed rule allow for recent graduates who have not yet passed the bar.

JUSTICE MARKMAN: Our rule doesn't say recent graduates it says graduates. Do you know what that means? Who is a graduate? I guess all of us sitting up here are graduates are we not?

MR. DePORRE: Yeah, absolutely.

JUSTICE MARKMAN: Do you - is it your understanding that the term graduate is broad enough to encompass somebody who is not a recent graduate? Indeed, is it broad enough to encompass somebody who may have taken the bar examination and failed it?

MR. DePORRE: The plain language of the rule would suggest that.

CHIEF JUSTICE KELLY: If there are no further questions, thank you Mr. DePorre.

MR. DePORRE: Thank you, your honor.

CHIEF JUSTICE KELLY: Imran Syed.

MR. SYED: Good morning. I'm a current student at the University of Michigan Law School, and for the past year I've worked as a student attorney in the Innocence Clinic. I grew up in the state of Michigan, I plan to live and practice here, so I take this rule and other court rules very seriously. And I think it's a good idea for the proposed amendments to the student practice rule to pass. And I'd like to speak very briefly to my personal experience which I think can help on parts of this debate -

JUSTICE YOUNG: It's customary to make your appearance on the record, sir.

MR. SYED: I'm sorry, I couldn't hear you.

CHIEF JUSTICE KELLY: Give us your name, sir.

MR. SYED: Imran Syed.

CHIEF JUSTICE KELLY: Yes.

MR. SYED: Okay. So as I said I was gonna speak to my experience in the clinic because I think it can prove a little helpful. Since first walking into the clinic a little more than a year ago, our work in the Innocence Clinic has been the biggest part of our lives for me and my partner in the clinic. We have devoted more time and energy to that work than to anything else because to us

this isn't just something we're doing, this will be the most important part of our law school experience. And that's certainly been my personal experience and I don't think that's an anomaly. I've devoted countless hours to building up cases and as we've talked about in the Innocence Clinic the vast majority of cases never get close to a court. But when we stumble upon that rare case that does that we've worked on for a long time, we are gonna know that case and care deeply about that case in a way that perhaps practicing attorneys couldn't because of all the other constraints that are placed on their time. Like I said, this will be our only case in law school or perhaps if we're really lucky there will be two. This isn't one of a hundred cases for us, this will always be our first real case and we're gonna present it with everything it takes. We're not going to be stretched for time. We don't have a hundred other clients to deal with. We don't have to worry about research costs. We are - this - like I said is something that we will always remember as our first experience and we're gonna take it very, very seriously. And should we fall short as (inaudible) students sometimes do, we will always have by our side our professors, both when we're preparing and also when we're in court. Should we forget to say something the correct way, the professor will always be there to correct our mistakes, to fill in what we left out, and what that means is the client's interests will always be very well represented. Just speaking from personal experience, we have dealt with certain clients from the clinic and they would feel very comfortable with us arguing these cases because they know we found what evidence we're bringing to court and we care about it very deeply. And having attorneys in there who don't have some of the constraints that other practicing attorneys do even with their best intentions means that in the rare case that students argue in the Court of Appeals that case will be argued with more passion, more thoroughly than the average attorney argues the average case in the Court of Appeals. I think that's an important consideration and while those are rare cases that students would argue, they certainly wouldn't bring down the level of advocacy in the Court of Appeals. If anything, they will help it. And I just wanted to speak to that, do you have any questions?

JUSTICE YOUNG: You think the absence of experience is a good thing when being an advocate.

MR. SYED: Your honor experience is something I think - First of all, we're law students so a lot of us have had experience in the business world dealing with -

JUSTICE YOUNG: But I'm talking as a lawyer - experience - the absence - the proposition you are urging is the absence of actual lawyering experience is advantageous to a client.

MR. SYED: No, your honor, that is not what I intended and I apologize if that's how it came across. What I was saying is that we have certain advantages that other attorneys who have experience - passion, time - which I think we can all agree is very, very important the time you can devote to a case. And in many instances we're talking - if we take me as an example, I could come back in less than a year and argue a case in the Court of Appeals but I couldn't today. And yet all the arguing experience that I will have I've gained through moot court that I've already done and the strength that we gain through law school is very important. And there's very little difference between me today and me six months from now because what I will have learned about a courtroom I will have already learned today. And because I do have less experience today, but having a professor standing by my side will help me when I have to walk into a court all by myself.

JUSTICE YOUNG: The current rule says supervision by a State Bar member includes the duty to examine and sign all pleadings filed. It does not require the State Bar member to be present.

MR. SYED: Your honor, my experience has been from the clinic that we would never go to a court without a professor. I was not aware that that's what the rule is, and I -

JUSTICE YOUNG: Do you think that is a - an appropriate level of supervision for students?

MR. SYED: I believe the professor should always be there as long as the student does not have a Bar license.

JUSTICE YOUNG: So you disagree with the current standard in the current rule.

MR. SYED: If that is the current rule, I'm not familiar with it, but yes. I'd like to also point out there have never been issues in trial court where students have been accused of presenting less than adequate assistance. As far as we're aware, there are no cases of ineffective assistance of student attorneys. A lot of the cases that we take on are not cases we're taking away from really qualified attorneys. These are cases we're taking on when no one else will. At least in the Innocence Clinic we are the last resort for a lot of these clients. And that's of course not an excuse to provide less than adequate assistance that is just a fact that we are not taking cases away from other attorneys who are dying to get them. We are taking on cases that we care deeply about that no one else at this point will even look at.

JUSTICE MARKMAN: Mr. Syed I hope that you and Mr. DePorre understand that those of us on this Court who are concerned about the proposed rule have no question that you and Mr. DePorre are highly conscientious students who are doing your best in this case and will represent your clients to the best of your ability. That of course is not the issue. The issue is whether or not this is a change in the larger sense designed to enhance the professionalism and the quality of representation in the second highest court of our state, the Michigan Court of Appeals. And I guess for many of us that needs to be the standard by which we assess these kinds of changes. Whether or not they will enhance the practice of law, the quality and professionalism of the practice in our appellate courts, or whether or not they won't do that. So I just want you to understand that there are no concerns as far as I know on anybody's part that you and Mr. DePorre and your colleagues at the University of Michigan and other law schools in the state are gonna do your best in these cases and are extremely conscientious. There are concerns about the larger issues involved in this kind of - this kind of movement in the practice of law in Michigan.

MR. SYED: Certainly, and if I could just briefly speak to that. We've mentioned experience before. We're going to have inexperienced attorneys walk into the Court of Appeals when they first get their license, and that is I think what's bringing down the level of overall advocacy that this Court has expressed concern about. But -

JUSTICE YOUNG: So we should have a period of leavening before we allow people to argue.

MR. SYED: I would - I would say that's precisely what this is - that's what a senior law student is. I believe that's why I would be allowed to walk into a trial court and argue a 6.500 motion hearing because they would like me to get that experience and be much better prepared as a trial lawyer. So I think bringing - increasing the overall level of advocacy would - would be helped if we were to as Justice Young said have a period where we have a crutch of sorts - have a professor by our side in case we do make mistakes have them pointed out and corrected.

JUSTICE YOUNG: The discussion so far has raised some issues with the current rule that I'm concerned about, and I would appreciate a point of privilege if I could ask Dean McCormick a couple of questions about the current rule.

CHIEF JUSTICE KELLY: Does anyone object to that? Dean would you wish to come back? Thank you, Mr. Syed.

MR. SYED: Thank you.

MS. McCORMACK: I could have escaped.

JUSTICE YOUNG: Yes, you could have, but you didn't. Welcome back.

MS. McCORMACK: Thank you.

JUSTICE YOUNG: The discussion has caused me to focus not just on the new proposal but the existing court rule. One is the issue that Mr. DePorre raised. The Sixth Circuit requires an explicit client approval. I take it your clinic follows that practice.

MS. McCORMACK: Our clinic actually - we have a retainer - In all of our clinics we have a retainer and we have our clients agree explicitly to student representation. It is also the case that they have come to the clinic seeking representation from the clinic and they understand that's how it works, that's true, but we still - we still do an explicit retainer.

JUSTICE YOUNG: Is there a reason why a client shouldn't explicitly acknowledge that they may be represented by a student lawyer?

MS. McCORMACK: I can't think of any reason why you wouldn't want a client to explicitly acknowledge that. As an administrator of a clinical program, from my perspective I'm (inaudible) with you on that.

JUSTICE YOUNG: The Sixth Circuit apparently has such an explicit requirement, our current rule doesn't. The other thing that I've noticed is that our rule currently which allows trial - student trial practice that supervision by a State Bar member includes a duty to examine and sign all pleadings, but it explicitly does not require that the member be present. Do you think that is a - an advisable standard?

MS. McCORMACK: You're asking me whether it's advisable - I'm gonna say it is not. And in our clinical programs if I learned of a clinical faculty member sending students to court without being there we'd have big problem.

JUSTICE YOUNG: All right.

MS. McCORMACK: So it would never happen in our clinical programs. I believe that's true of all the clinical programs. Having said that, just as a point of information, I do believe there may be some other offices which employ law students during summers or even during the school year which may not have that same practice. So I can't - I can't -

JUSTICE YOUNG: I'm simply - I'm not asking -

MS. McCORMACK: Yeah.

JUSTICE YOUNG: what the normative fate is -

MS. McCORMACK: Okay.

JUSTICE YOUNG: but whether it is an appropriate standard to require the presence of a licensed lawyer whenever a student is appearing in court.

MS. McCORMACK: I'm with you; I think it's appropriate to require the presence of a licensed lawyer with a student any time the student appears in a court, in an administrative hearing, in any contested action.

JUSTICE YOUNG: And my final question is one raised by Justice Markman. I hadn't realized that this program currently applies to not only law students but to graduates. Do you customarily allow graduates to participate as student attorneys?

MS. McCORMACK: So the rule is law students and recent law graduates -

JUSTICE YOUNG: Nope, it doesn't say recent does it?

MS. McCORMACK: Oh, I'm reading §A - law students and recent law graduates under supervision by a member of the State Bar may staff public -

JUSTICE MARKMAN: Okay, it doesn't say recent.

JUSTICE YOUNG: Well, but maybe it's higher in the rule. I was just looking at §D, and maybe it's - maybe it's limited to the earlier.

MS. McCORMACK: And it's also in the title too. So the title says recent and §A says recent -

JUSTICE YOUNG: Okay, I've just - I have just a quotation from it.

MS. McCORMACK: Okay.

CHIEF JUSTICE KELLY: So it is recent law grad?

MS. McCORMACK: Yes. And my understanding of that rule, and I want to answer your question Justice Young, is that just like a law student who had worked under my supervision in the clinic could appear in court, always with me at their side, if that law student graduated and wanted to continue on a case say pro bono with their law firm and that has happened on - in a few occasions. We right now have - I have with me today a recent law graduate who's staying with the clinic for two months until he starts with his firm, and I would certainly - he's already taken the Bar, I don't know yet that he's passed because

it's California, but I am pretty confident he's passed and I would certainly feel comfortable with him.

JUSTICE YOUNG: I think subsection A does provide a context for what graduate means –

MS. McCORMACK: Okay, thank you.

JUSTICE YOUNG: in D(2)(a).

MS. McCORMACK: Okay. Thank you.

JUSTICE YOUNG: Okay.

MS. McCORMACK: May I just get back to – The Sixth Circuit rule which requires explicit permission from the client, it also and Mr. DePorre I think knows better than I do at this point because I haven't been to the Sixth Circuit in a couple of years, but it also requires permission from the panel. And I – I don't believe the federal district courts have that same set of requirements. So the Sixth Circuit does require a bit more for an appellate argument than the trial courts do in the federal system. And, frankly, I think that's appropriate. I read the comments – the proposed amendments to your proposed changes – the Sunset Provision as well as the requirement that a supervising attorney actually be present in the Court of Appeals – and I view those as excellent amendments and I would – I would urge the Court to adopt the amendments with the proposal.

JUSTICE MARKMAN: Ms. McCormack?

MS. McCORMACK: Yes.

JUSTICE MARKMAN: You know these things as well as I do, but in order to practice law in this state one has to graduate from law school, one has to pass the Bar examination, one has to pass the standards of Character and Fitness, and as I said a few minutes earlier one has to take an oath to the standards of professional conduct and to the other ethical requirements of the practice of law. An oath is the most compelling kind of commitment that our society has yet devised in support of some value or some statement. Is it not consequential to you the absence of this requirement for students who are – and it doesn't say recent – students or graduates who are practicing under the

authority of this rule? Is the absence of an oath not consequential to you?

MS. McCORMACK: Well, for whatever it's worth I agree with you about the importance of an oath, and at the University of Michigan three years ago we started requiring an oath of our new students during orientation. I have to say it's an incredibly moving part of orientation and the law students all stand up and take an oath to the professionalism norms that they are in our view by entering law school becoming part of.

JUSTICE MARKMAN: But it's not - it's not - I'm glad there's that oath -

MS. McCORMACK: Yeah.

JUSTICE MARKMAN: or there used to be that oath, but it's not an oath that's approved by We the People of the state of Michigan which is the kind of oath that everybody else - everybody else coming before this Court and the Court of Appeals has to take as a precondition to involving themselves in the rule of law process in this state. Your students alone - I mean the University of Michigan - but the students authorized under this rule alone are allowed to practice without those preconditions.

MS. McCORMACK: That is true. For whatever it's worth, I believe when my students are practicing on my law license, which is what they're doing when they're in my clinic, that I have - that my oath is - extends to anything they do. So I take my supervision of everything they do incredibly seriously, and I tell them you're practicing on my -

JUSTICE MARKMAN: I believe you do, I have no doubt about it.

MS. McCORMACK: Yeah. I understand.

JUSTICE MARKMAN: But what does the actions of the oath and this provision say about the worth and the value of the oath that everyone else has to take? What does it say about it?

MS. McCORMACK: I think it says that the supervising attorney's oath counts for the student's representation.

Having said that, I don't have any objection to requiring or having some kind of certification process for a student attorney who was to argue before the Court of Appeals or any other court that you thought it was appropriate. That if this Court felt like some oath - some kind of oath was important - I don't object to an oath and I agree with you about what that oath says about our profession and what it means to me personally.

JUSTICE DAVIS: Let me ask you this question Dean. Do you draw a distinction between presenting the case under supervision as an educational experience and practicing law in a broad term?

MS. McCORMACK: To make sure I understand your question. Are you asking what the differences are when I'm working on a case for pedagogical reasons -

JUSTICE DAVIS: Well, (inaudible) you advocate for cutting somebody lose on the public and send them out to go about the business of practicing law under these rules without taking oaths or doing anything else.

MS. McCORMACK: One more time, I'm sorry. I'm slow today. I got up really early.

JUSTICE DAVIS: It seems to me and I'm interested in the distinctions that are being made about the oath that what you're advocating is an educational experience. It's under supervision - direct supervision - and it is considerably different than all the things that entail the practice of law and that is the distinction. And that may be the resolution to Justice Markman's concerns about the oaths. Now do you think that's right or wrong?

MS. McCORMACK: I do think there is a difference between a student attorney practicing in a clinic and a recent law graduate who has not yet taken an oath in certain contexts. And I do think there are safeguards in our clinical programs that should make the Justices of this Court and the judges of the Court of Appeals and the judges in the trial courts who we appear before feel better, but -

JUSTICE YOUNG: The problem is - excuse me.

MS. McCORMACK: Yes.

JUSTICE YOUNG: The problem is the rule doesn't - isn't limited to the University of Michigan's clinical program.

MS. McCORMACK: That's correct. It's law students in other law offices, the State Appellate Defender's Office has excellent law students working for them in the summer, and, frankly, I think law students being supervised by the excellent lawyers in the State Appellate Defender Offices could come do terrific arguments before the Court of Appeals.

JUSTICE YOUNG: Any licensed member of the Bar can sponsor a student.

MS. McCORMACK: That's right. I mean as you're aware, it's in legal services to indigent - it's in offices where we're providing services to indigent persons. So it's not - that's what the rule is.

JUSTICE CORRIGAN: It also extends, for example, to prosecuting attorneys' summer programs as well -

MS. McCORMACK: Yes.

JUSTICE CORRIGAN: it's not just on the indigent defense (inaudible).

MS. McCORMACK: Yes, actually I think they're a big - a big user of the rule. A lot of students have excellent experiences in the trial courts working in the prosecutor's offices during the summer so I believe that's - that's - they're a big user of the rule.

CHIEF JUSTICE KELLY: If there are no further questions, then we thank you.

MS. McCORMACK: Okay, thank you.

JUSTICE YOUNG: Thank you very much.

MS. McCORMACK: I'm gonna run out this time.

JUSTICE YOUNG: No, stick around we might have other questions.

CHIEF JUSTICE KELLY: Nobody's here on items 5 - item 5 or 7, but we have one person on item 6 which is proposed revisions of the case flow management guidelines and it's again Patrick Clawson.

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MR. CLAWSON: Thank you very much again. I'll be very brief. I'm a little concerned after reading the proposal here that the Court is going to be unnecessarily tying the hands of judges in terms of decision making that they need to make involving special cases in their - in their courts. What I'm especially concerned about are the repeated references that delete the exception for individual cases in which the court determines exceptional circumstances exist. Not long ago I had a case in Macomb County where I'd been assigned to serve process on an organized crime figure. It involved a very large amount of money that he had defrauded a person of. We were finally able to locate the individual in Venezuela. We applied for an extension of summons so that we could try to get the individual served in Venezuela, but that required an extended period of time to meet U.S. government and Hague Convention treaty requirements. The judge refused to grant that on the grounds that it would have exceeded the SCAO guidelines for how long the case would be adjudicated and the case was dismissed. And unfortunately my client was unable to recover the money that had been taken by the organized crime figure. So I would encourage the Court to allow judges to be able to retain some discretion in terms of the management of the cases before their courts, that they're not necessarily completely handcuffed into meeting a certain quota. My biggest concern with this proposal, however, relates to the paragraph or the sentence "the State Court Administrative Office does not intend to use these data is a punitive fashion or to publish these data for public review." Since when are case management statistics state secrets. Why should they be withheld from the public? The public has an absolute right to know how its courts - and I want to emphasize its courts - are functioning. The courts do not belong to the judiciary or to the Bar, they belong to the people. I cannot see any possible reason for keeping workflow or case management statistics -

JUSTICE YOUNG: I thought you just stated one.

MR. CLAWSON: secret from public view. I'm sorry, sir.

JUSTICE YOUNG: I thought you just stated one. You were concerned that courts would be unnecessarily hamstrung by these requirements. Well, let me just - I don't disagree with your philosophical statement that this is public data, but one of the possible consequences of publishing them is that everyone will see them not as merely guidelines about - around which to exercise proper judicial discretion about how a particular case should be managed, but that they become mandatory if your data is published. Do you understand the point I'm making?

MR. CLAWSON: I do, but I don't agree with it.

JUSTICE YOUNG: And maybe that's perfectly fine, but I thought you were just making a point just prior to that - the point that this is public information - don't hamstring judges because individual cases need to be treated individually.

MR. CLAWSON: True.

JUSTICE YOUNG: Okay.

MR. CLAWSON: I don't believe that publishing data hamstrings judges in anyway. If a judge has got an exceptional case -

JUSTICE YOUNG: Then why would publishing a particular timeframe - normative timeframe be any restraint?

MR. CLAWSON: Publishing a normative timeframe is fine so long as the judge has discretion if he has a particular case - he or she has a particular case pending in their court that might have to exceed the guidelines.

JUSTICE YOUNG: Did you read anything that suggests this other than the guideline?

MR. CLAWSON: What I'm reading here is something that states that the State Court Administrative Office does not intend to publish this data for public review. That's where I have a problem.

JUSTICE YOUNG: Okay.

CHIEF JUSTICE KELLY: But you should know sir that these guidelines have been in this stage of development for a period now -

MR. CLAWSON: Yes.

CHIEF JUSTICE KELLY: and we're not certain - I believe that I can speak for others as well as myself - we're not certain that in every case the guidelines are reasonable. We're still adjusting them. In fact, this proposal before us is to adjust part of these guidelines. The idea being that in practice it might not be possible to meet the guidelines that we've - that we've set. I think one concern is that it would be unfair to judges to publish their performance with respect to the guidelines when the guidelines are still in a stage of not being yet certain.

MR. CLAWSON: Well, I've met very few judges in this state that don't seem to be - that are not capable of defending themselves publicly. Most judges in this state are pretty bright and pretty outspoken and I think that they're quite capable of defending themselves. I do think that the public has a right to know how its courts are operating. And if there is an aberration in a particular court's processing of cases, I think that can be reasonably explained to the public if anybody has any questions. But to seal off that information from any kind of public access is just nonsense. This is - these are not nuclear defense secrets. These are not actionable intelligence items on terrorist activities. These are performance statistics. What this is is another symptom of what I have found to be a cancerous level of secrecy in Michigan state government. Since I returned to Michigan six years ago after nearly thirty years in Washington, D.C. I have been absolutely thunderstruck by the excessive levels of secrecy that exists at almost all levels of state government here. And indeed the judiciary has more than its fair share of excessive secrecy. Now to cloak off from the public statistical information on how the courts are functioning doesn't serve the judiciary well either. Transparency and sunshine is the best policy for making sure that things function properly.

CHIEF JUSTICE KELLY: Okay. Any questions? Thank you, Mr. Clawson.

MR. CLAWSON: Thank you very much.

CHIEF JUSTICE KELLY: Now that concludes our public hearing.